

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in December 2012

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

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| <u>KEYWORDS:</u> | Criminal Complaint; Felony Charges; Embezzlement; Disciplinary Action; Pending Criminal Charges |
| <u>CASE STYLE:</u> | <u>Meadows v. Nicholas County Board of Education</u> DOCKET NO. 2013-0255-NicED (12/19/2012) |
| <u>PRIMARY ISSUES:</u> | Whether there is a sufficient nexus between the pending charges and Grievant's employment as a teacher to support a suspension. |
| <u>SUMMARY:</u> | <p>On August 2, 2012, a criminal complaint was filed with a Magistrate for Nicholas County, West Virginia, charging Grievant with felony embezzlement and conducting a fraudulent scheme concerning over \$30,000.00 he allegedly transferred from the account of the Deer Creek Wildlife Club, Inc., into his personal checking account, while serving as the Club's Treasurer. On August 8, 2012, the County Superintendent, Beverly Kingery, directed Grievant to meet with her concerning his employment for the 2012-2013 school year. Following this meeting on August 15, 2012, Superintendent Kingery notified Grievant that she was suspending him without pay, effective immediately, based upon these charges. The Nicholas County Board of Education voted to approve the suspension on August 20, 2012. These felony criminal charges remain pending. The controlling issue is whether there is a sufficient nexus between the pending charges and Grievant's employment as a teacher to support an indefinite suspension. As a classroom teacher and assistant coach, Grievant's duties include handling class funds and athletic funds. Therefore, Respondent has asserted a rational nexus to support its suspension of Grievant pending the outcome of these criminal charges.</p> |

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

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| <u>KEYWORDS:</u> | Bus Stop; Drop Off Policy; Procedure; Disciplinary Action |
| <u>CASE STYLE:</u> | <u>Wikle v. Monroe County Board of Education</u> DOCKET NO. 2012-0720-MnrED (12/4/2012) |
| <u>PRIMARY ISSUES:</u> | Whether the disciplinary action taken was too severe or constitute an abuse of discretion for an acknowledged violation of applicable governing policy. |
| <u>SUMMARY:</u> | <p>Grievant, a bus operator for Monroe County Board of Education, released a four year old pre-k student from her bus into the care of a neighbor instead of a parent or legal guardian in violation of MCBOE Policy EEA. The County School Board Superintendent recommended a three day suspension, without pay, as disciplinary action which was subsequently approved and levied by Monroe County Board of Education, Respondent.</p> <p>Grievant acknowledges the violation of applicable policy, but avers the circumstances and her good faith actions do not warrant such a severe penalty. Further, Grievant alleged she was not treated the same as other employees who committed a similar or more severe infraction. Grievant was aware of MCBOE Policy EEA, which provides that "students in grades preschool through grade three are required to be met by a parent or guardian at the bus stop," and she had been trained on Policy EEA on several occasions over the years. Grievant did not demonstrate that the penalty imposed was too severe or that Respondent's actions constitute an abuse of discretion. Accordingly, this grievance is DENIED.</p> |

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| <u>KEYWORDS:</u> | Extracurricular Assignments; Assignment Change; Arbitrary and Capricious; Additional Day |
| <u>CASE STYLE:</u> | <u>Garner v. Monongalia County Board of Education</u> DOCKET NO. 2012-0679-MonED (12/18/2012) |
| <u>PRIMARY ISSUES:</u> | Whether Respondent's determination that the addition of one day to the extracurricular assignment rendered it a new assignment was reasonable, and not arbitrary and capricious. |
| <u>SUMMARY:</u> | Grievant argued he should have been allowed to retain the extracurricular assignment at issued from year to year, because it was the same run. The change in the after school program associated with this assignment, and accordingly the change in the assignment from four days a week to five days a week rendered this a different assignment. Grievant was paid an hourly rate for the actual time worked, not a flat rate, and the addition of one more day each week created a more appealing assignment for the bus operators who would consider bidding on these types of assignments. |
| <u>KEYWORDS:</u> | Job Description; Pay Grade; Posted Position; Misclassification |
| <u>CASE STYLE:</u> | <u>Shaffer v. Kanawha County Board of Education</u> DOCKET NO. 2011-1773-KanED (12/13/2012) |
| <u>PRIMARY ISSUES:</u> | Whether Grievant is misclassified because he is asked to undertake some responsibilities normally associated with a higher classification |
| <u>SUMMARY:</u> | Mr. Shaffer's grievance is timely but is without merit because occasionally performing skilled tasks outside of one's job classification does not render one misclassified per se. |
| <u>KEYWORDS:</u> | Summer Substitute; Summer Employment; Classification Category Seniority |
| <u>CASE STYLE:</u> | <u>Martin v. Kanawha County Board of Education</u> DOCKET NO. 2011-1876-KanED (12/14/2012) |
| <u>PRIMARY ISSUES:</u> | Whether Respondent improperly denied Grievant the opportunity to substitute during a portion of the summer term. |
| <u>SUMMARY:</u> | Grievant, a 200-day school service employee, alleges that Respondent improperly denied her the opportunity to substitute on certain dates during the summer of 2011. Grievant was not entitled to first opportunity to substitute under West Virginia Code § 18-5-39 for the positions she sought because the positions were not summer positions and because the positions were not within the same classification category as Grievant's regular employment contract. Therefore, this grievance is DENIED. |

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| <u>KEYWORDS:</u> | Timeliness; Next In Line; Classification; Vacant Position; Most Senior Candidate |
| <u>CASE STYLE:</u> | <u>Cook v. Lincoln County Board of Education</u> DOCKET NO. 2012-0106-LinED (12/4/2012) |
| <u>PRIMARY ISSUES:</u> | Whether Grievant is entitled to the relief of reinstatement into the posted Bus Operator position. |
| <u>SUMMARY:</u> | <p>Grievant argues that the successful applicant should not have been selected for the position because he was not working in the Bus Operator classification when the position was posted and priority must be given to those applicants working in the posted classification. Grievant notes that he may not have been the most senior Bus Operator applicant who applied for the position, but the person who is more senior than him did not contest the selection of another candidate. Since Grievant was the only applicant to file a grievance, he believes he is entitled to be placed in the position if the successful applicant was improperly selected.</p> <p>Respondent believes that it was appropriate to select the successful applicant because he was working as a Bus Operator when the position was filled and when the job was to start. Additionally, Respondent argues that the grievance was not filed within the statutory time frame and that Grievant did not have standing to be placed in the position because there was a more senior applicant for the position who would have received the position if the successful applicant had not been selected.</p> <p>Respondent did not prove that the grievance was untimely. The successful applicant was improperly selected for the position. However, Grievant is not entitled to be placed in the bus run vacancy because he was not the next applicant in line for the position and would not have received the position had the successful applicant not been selected.</p> |

KEYWORDS: Willful Neglect of Duty; Improper Behavior; Safety; Unsupervised Elementary Students; Failure to Turn Off Ignition; Mitigation; Arbitrary and Capricious

CASE STYLE: Hale v. Lewis County Board of Education
DOCKET NO. 2012-1238-LewED (12/5/2012)

PRIMARY ISSUES: Whether Respondent demonstrated that Grievant's actions constituted willful neglect of duty, and whether the discipline should be mitigated.

SUMMARY: Grievant was terminated from her employment as a Bus Operator after she exited her bus to use the restroom, leaving her bus running and unattended while kindergarten and grade school children were boarding the bus at an elementary school. Respondent demonstrated that Grievant willfully neglected her duty.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Advisory Opinion; Abstract Propositions; No Additional Relief

CASE STYLE: Nestor v. Department of Health and Human Resources/Hopemont Hospital
DOCKET NO. 2012-0149-CONS (12/4/2012)

PRIMARY ISSUES: Whether there is any additional relief that can be granted by the Grievance Board.

SUMMARY: The issues raised in the other grievances are a moot point since Grievant is no longer an employee of Respondent. Under these circumstances, there is no additional relief that could be granted by the Grievance Board even if Grievant were to prevail on the merits. Accordingly, the grievances under this consolidated docket number are dismissed.

KEYWORDS: Advisory Opinion; Relief; Moot; Wholly Unavailable; Speculative

CASE STYLE: Jackson v. Division of Juvenile Services/Gene Spadaro Juvenile Center
DOCKET NO. 2012-0442-MAPS (12/19/2012)

PRIMARY ISSUES: Whether the Grievance Board has the authority to grant the relief Grievant is seeking.

SUMMARY: Grievant seeks relief conditioned upon events or injuries that have not yet occurred. Accordingly, the relief sought is speculative and any ruling made thereon would be an advisory opinion. As the Grievance Board does not issue advisory opinions, this grievance is DISMISSED.

KEYWORDS: Dismissal; Relief; Severance Pay; Probationary Employee; Unsatisfactory Performance

CASE STYLE: Bond v. Mid-Ohio Valley Health Department
DOCKET NO. 2013-0108-MidCH (12/18/2012)

PRIMARY ISSUES: Whether the relief requested is available through the grievance procedure?

SUMMARY: Grievant, a probationary employee, was dismissed from her employment for unsatisfactory performance. Grievant is not seeking reinstatement, but only three month's severance pay as relief. This relief is not available as a matter of law through the grievance procedure. Grievance DISMISSED.

KEYWORDS: Gross Misconduct, Inappropriate Behavior; Cell Phone Policy

CASE STYLE: Linger v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2010-1490-CONS (12/5/2012)

PRIMARY ISSUES: Whether Grievant's conduct warranted dismissal from her employment.

SUMMARY: Grievant was dismissed from her employment due to alleged gross misconduct involving inappropriate behavior of a sexual nature, and for violating the facility's cell phone policy. Grievant did not dispute that the conduct occurred, took responsibility for her inappropriate actions, and instructed her staff to refrain from any comments with sexual connotations. Respondent meet its burden of proof in establishing the charges against the Grievant; however, termination of employment was excessive given the circumstances of this matter. Accordingly, this grievance is granted, in part, and denied, in part.

KEYWORDS: Holiday Leave; Leave Policy; Discrimination; Retaliation

CASE STYLE: Smith v. Division of Corrections/Huttonsville Correctional Center
DOCKET NO. 2012-0304-MAPS (12/12/2012)

PRIMARY ISSUES: Whether Grievant meet his burden of proof and established that he was the victim of discrimination or reprisal.

SUMMARY: Grievant is employed at the Huttonsville Correctional Center as a Correctional Unit Manager. He challenges Respondent's directive that he could not use earned holiday leave during his scheduled vacation. Grievant claims this directive was an act of discrimination and retaliation. The facts of this grievance did not demonstrate discrimination or reprisal. Accordingly, this grievance is denied.

KEYWORDS: Hostile Work Environment; Inappropriate Behavior; Going Postal; Workplace Security; Threatening or Assaultive Behavior

CASE STYLE: Rizer v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2011-0606-DHHR (12/4/2012)

PRIMARY ISSUES: Whether the written reprimand was disproportionate to the offense or arbitrary and capricious.

SUMMARY: Grievant, with an angry and out-of-control demeanor, made a disturbing statement to a co-worker, for which she was disciplined with a written reprimand. Respondent proved the misconduct, but incorrectly labeled the nature of the misconduct in the written reprimand. It is the conduct and not the label attached to it that is important when determining if the discipline is proper. The written reprimand was proper, and Grievant did not prove that the level of discipline was disproportionate to the offense or otherwise arbitrary and capricious.

KEYWORDS: Injury While on the Job; Return to Work; Limitations; Doctor's Note; Restrictions; Full Duty Release

CASE STYLE: Cassella v. Division of Highways
DOCKET NO. 2011-0379-CONS (12/18/2012)

PRIMARY ISSUES: Whether Respondent was acting in accordance with DOP Rule 14.4 (h) when it refused to allow Grievant to return to work.

SUMMARY: Grievant suffered an injury while on the job in September 2010. He was placed on restrictions by his treating physician that made it impossible to perform his job duties safely and productively. Grievant later had surgery on his injured shoulder and was placed on restrictions by his treating physician that required he be off work. In this instance, the Respondent was authorized to refuse to allow the Grievant to return to work at less than full duty.
Upon his return to work, Grievant notified his supervisor that, notwithstanding his full duty return to work note, he had further limitations. His supervisor sent him home with the admonition that he provide a doctor's note concerning the new restrictions. Respondent had the right to require additional information before deciding whether Grievant should be allowed to return to work. The grievance is denied.

KEYWORDS: Job Abandonment ; Arbitrary and Capricious; Abuse of Discretion; Work Schedule; Reprisal

CASE STYLE: Cassella v. Division of Highways
DOCKET NO. 2012-0496-DOT (12/11/2012)

PRIMARY ISSUES: Whether Respondent's refusal to allow Grievant to attend grievance hearings as an employee representative, in which he was not a fellow employee, was an arbitrary and capricious action. Whether Respondent engaged in an act of reprisal against Grievant.

SUMMARY: Grievant is employed as a Transportation Worker 2, Craft Worker, for Respondent. He has been employed with Respondent since December 16, 2008. Grievant charges that he was informed by his supervisor, Larry Weaver, that if he attended a level three hearing as an employee representative in hearings not involving the Respondent, he could be terminated for job abandonment. Grievant also alleges that he was being transferred to night shift to prevent his participation in future grievances. Grievant did not meet his burden of proof and establish Respondent's refusal to allow him to attend grievance hearings as an employee representative, in which he was not a fellow employee, was an arbitrary and capricious action by Respondent. In addition, Grievant did not demonstrate that Respondent's decision to change his work schedule was a violation of any rule, law or policy, or was an abuse of discretion.

KEYWORDS: Moot; Position; Relief

CASE STYLE: Burnworth v. Division of Rehabilitation Services
DOCKET NO. 2011-0863-DEA (12/7/2012)

PRIMARY ISSUES: Whether there is any remedy available to Grievant through the Grievance Procedure.

SUMMARY: On August 31, 2012, Respondent filed a Motion to Dismiss the grievance as moot. A telephonic hearing was held regarding the Motion to Dismiss on September 25, 2012. Grievants' representative, Gordon Simmons, participated in the hearing as did Katherine Campbell, Assistant Attorney General, counsel for the Respondent. Both sides explained their positions and Grievants' representative was offered an opportunity to provide a written response to Respondent's motion, which he declined.

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| <u>KEYWORDS:</u> | Moot; Relief; Vacant Position |
| <u>CASE STYLE:</u> | <u>Zimmerman v. Division of Rehabilitation Services</u> DOCKET NO. 2011-0825-DEA (12/7/2012) |
| <u>PRIMARY ISSUES:</u> | Whether there is remedy available to Grievant in the Public Employees Grievance Procedure. |
| <u>SUMMARY:</u> | On August 31, 2012, Respondent filed a Motion to Dismiss the grievance as moot. A telephonic hearing was held regarding the Motion to Dismiss on September 25, 2012. Grievants' representative, Gordon Simmons, participated in the hearing as did Katherine Campbell, Assistant Attorney General, counsel for the Respondent. Both sides explained their positions and Grievants' representative was offered an opportunity to provide a written response to Respondent's motion, which he declined. |
| <u>KEYWORDS:</u> | Most Qualified Applicant; Eligible Employees; Similar Qualifications; Interview Process; Discrimination; Favoritism; Arbitrary and Capricious |
| <u>CASE STYLE:</u> | <u>Chapman v. Division of Highways and Larry E. Thacker, Jr., Intervenor</u> DOCKET NO. 2011-1298-DOT (12/10/2012) |
| <u>PRIMARY ISSUES:</u> | Whether Respondent's selection of a Transportation Crew Supervisor I was arbitrary and capricious or that discrimination was involved in the selection. |
| <u>SUMMARY:</u> | <p>Grievant is classified as a Transportation Worker 2 Equipment Operator with the Department of Transportation/Division of Highways, Respondent. Grievant applied for a Transportation Crew Supervisor 1 position and was not the successful applicant. Grievant contends that he should have been the successful applicant.</p> <p>Subsequent to the interview process, an employee other than Grievant was deemed more qualified for the posted position. Grievant has not established by a preponderance of the evidence that Respondent's selection was improper or a case of discrimination and/or favoritism pursuant to applicable grievance procedure. Grievant failed to demonstrate that the selection decision made was arbitrary, capricious or clearly wrong. Most importantly, Grievant did not demonstrate he was the most qualified applicant. Accordingly this grievance is DENIED.</p> |

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| <u>KEYWORDS:</u> | Performance Improvement Plan; Attendance Policy; Progressive Discipline; Final Wages; Good Cause |
| <u>CASE STYLE:</u> | <u>Payne v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital</u> DOCKET NO. 2012-1493-CONS (12/17/2012) |
| <u>PRIMARY ISSUES:</u> | Whether Respondent had good cause to dismiss Grievant for continued violation of its attendance policy. |
| <u>SUMMARY:</u> | Grievant was suspended and later dismissed for violating Respondent's attendance policy. Because of his supervisor's mistake regarding the suspension dates, Grievant served the suspension, was charged annual leave for those dates, and was then required to serve the suspension again. Respondent proved by a preponderance of the evidence that Grievant repeatedly violated the attendance policy, and that it was justified in its disciplinary actions under the policy. Respondent had good cause to dismiss Grievant for his continued violation of the attendance policy despite repeated warnings, as Grievant's failure to provide adequate attendance to his job was not trivial or a technical violation. Respondent was not justified in requiring Grievant to take annual leave for his supervisor's mistake in informing him of his suspension dates. Grievant also alleges and requests damages from Respondent's failure to pay his final wages within seventy-two hours, but provided no evidence of this alleged failure. Therefore, his request for damages must be denied. |

KEYWORDS: Policy Violation; Physical Restraint; Patient Injury; Gross Misconduct; Progressive Discipline; Mitigation

CASE STYLE: Dean v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2012-1230-DHHR (12/28/2012)

PRIMARY ISSUES: Whether Grievant violated Respondent policies when he physically restrained a patient, resulting in injuries.

SUMMARY: Respondent met its burden by a preponderance of the evidence in proving that there was good cause to terminate Grievant's employment for gross misconduct when Grievant violated Respondent's policies on the physical restraint of patients. A patient suffered physical injury directly related to Grievant's action. Respondent did not abuse its [substantial] discretion to determine the penalty in this situation in that the misconduct is of a substantial nature directly affecting the rights and interest of the public, is not a trivial or inconsequential matter nor is it a mere technical violation of a statute. Respondent did not violate its progressive discipline policy. There are no mitigating circumstances that would warrant a reduction in Grievant's punishment of termination.

KEYWORDS: Suspension, Discipline

CASE STYLE: Reveal v. Regional Jail and Correctional Facility Authority/South Central Regional Jail
DOCKET NO. 2012-1002-CONS (12/7/2012)

PRIMARY ISSUES: Whether Respondent proved that Grievant violated RJA policies and procedures.

SUMMARY: Respondent imposed two suspensions upon Grievant between December 2011 and March 2012. In two separate grievance actions, which were later consolidated, Grievant argued that these suspensions were improper. Respondent denied Grievant's allegations. Respondent failed to present any evidence at the Level Three hearing regarding Grievant's December 6, 2011, grievance. As such, Respondent failed to meet its burden of proof in this grievance. Regarding the February 15, 2012, grievance, Respondent alleged that Grievant violated various RJA policies, procedures, and post orders during an incident that occurred on January 31, 2012. Respondent failed to meet its burden of proving the charges alleged against Grievant. Accordingly, this consolidated grievance is GRANTED.

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| <u>KEYWORDS:</u> | Work Experience; Classification; Minimum Qualifications; Regent's Bachelors Degree |
| <u>CASE STYLE:</u> | <u>Williams v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital and Division of Personnel</u> DOCKET NO. 2010-1592-DHHR (12/10/2012) |
| <u>PRIMARY ISSUES:</u> | Whether Respondent acted improperly when it failed to consider Grievant for a Nurse II or Nurse III position. |
| <u>SUMMARY:</u> | <p>Grievant was employed by Respondent DHHR as a Nurse I at Mildred Mitchell-Bateman Hospital in Huntington, West Virginia. Grievant made application for a posted position to be filled as a Nurse II or Nurse III serving as the Bar Code Medication Administration (BCMA) trainer and coordinator for the hospital. Grievant was not considered for the position because she did not then have one year's nursing experience, the minimum requirement to fill a Nurse II position. Under the Division of Personnel's classification specifications for a Nurse II, an applicant with a baccalaureate degree in nursing from an accredited four-year college does not require any specific amount of experience. An employee with a baccalaureate degree in nursing from an accredited four-year college only requires two years' experience as a nurse to fill a Nurse III position. However, the Division of Personnel does not consider Grievant's Regent's Bachelor of Arts ("RBA") degree from Marshall University to be a "baccalaureate degree in nursing," because an RBA does not have a specific major or minor, and where a particular course of study (nursing) is required in the classification specification, the Division of Personnel will not review the course work leading to award of an RBA to determine if the degree has a particular focus, such as nursing or health sciences. Because the Division of Personnel's interpretation and explanation of the training requirements in its classification specification for Nurse II and III are not clearly erroneous, this grievance must be DENIED.</p> |